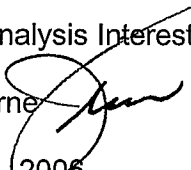




OFFICE OF
INSURANCE COMMISSIONER

MEMORANDUM

TO: Market Analysis Interested Parties

FROM: Jim Odiorne 

DATE: March 23, 2006

RE: Response to comments on Sections 5-6 of Z Draft

Thank you to all who provided comments. All comments, as they were received, are attached for your review. We look forward to a more complete discussion of these comments at our meeting on March 29 here in Tumwater. The following are our initial comments on some of the major issues identified in your comments.

Contrary to allegations in some comments, Z draft section 5 (1)(a) and (b) are contained in the NAIC model. You can find them in Section 11 of the model. See my side-by-side comparison dated January 10, 2006.

Market conduct surveillance will not work well unless comparable information is received from all participants in the marketplace. Without an enforceable requirement to file information, available resources will possibly be largely devoted to attempting to compile comparable data.

We are not inclined to establish a different set of disciplinary standards in a Market Analysis chapter than exists for other areas of the Insurance Code. We can consider a reference to other applicable Insurance Code provisions for penalties related to a failure to file annual statements.

Because of its importance to and impact on the public, a regulated industry is subject to much closer scrutiny than general business entities. This office has and must continue to have free access to insurer records and documents. Please note that there is no qualifier in RCW 48.03.030 to that free access. In order to make that free access more comfortable to insurers, OIC, from the start of this project, agreed to broad confidentiality language in Z Draft, section 9, not to prevent OIC access but to assure no access to third parties. Free access to records by OIC is essential.

Limiting outside information to sources that are published at least annually significantly limits OIC's ability to deal with marketplace issues as they arise. Comment suggested language would assure OIC had 18 month old information to work with rather than a few months old information.

If OIC were to consider language requiring verification of data with insurers, would insurers agree to a reasonable statutory time for completion of verification?

NOTE

Comments on draft sections or other issues related to this Market Analysis project should be sent electronically to Jim Odiorne at JimO@oic.wa.gov. If you cannot transmit electronically, please fax to Jim Odiorne at 360-586-2022. It is not necessary to send electronically and fax – one transmission is sufficient. Please submit your comments no later than noon on the day indicated on the "Next Steps" schedule.

Jim Odiorne

From: Beth Berendt
Sent: Wednesday, March 22, 2006 12:57 PM
To: Jim Odiorne
Subject: FW: NAMIC's Comments on WA Proposed Market Conduct Legislation



WA Market Conduct
Analysis Com...

-----Original Message-----

From: Christian Rataj [mailto:crataj@namic.org]
Sent: Wednesday, March 22, 2006 10:45 AM
To: Beth Berendt
Subject: NAMIC's Comments on WA Proposed Market Conduct Legislation

Dear Beth:

Enclosed please find NAMIC's Comments to Sections 5 and 6 of the "Z Draft". Thanks for your time and effort on this matter. Have a wonderful day!

Christian John Rataj, Esq.
NAMIC State Affairs Manager
6707 Flagler Road
Ft. Collins, CO 80525
970.204.6695 (telephone)
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crataj@namic.org



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March 22, 2006

The Honorable Mike Kreidler
Insurance Commissioner
State of Washington
5000 Capitol Way
Tumwater, Washington 98501

sent via email to:
BethB@OIC.WA.GOV

**Re: NAMIC's Comments on Market Conduct Surveillance Model Act
Sections 5 and 6 of "Z draft"**

Dear Commissioner Kreidler:

Thank you for affording the National Association of Mutual Insurance Companies (NAMIC) and members of the insurance industry an opportunity to work closely with your department to assist you in drafting a Market Conduct Surveillance Model Act that is cost-effective and promotes efficiency in the regulatory process.

NAMIC is a full-service national trade association with more than 1,400 member companies that underwrite approximately 43 percent (\$196 billion) of the property/casualty insurance premium in the United States. NAMIC membership includes four of the seven largest property/casualty insurance carriers in the nation, and every size regional, national and state specific property/casualty insurer, including hundreds of farm mutual insurance companies. NAMIC has 110 member insurance carriers doing business in the state of Washington, who write approximately 31% of the property/casualty insurance business in the state.

On behalf of NAMIC, I respectfully submit the following comments on Sections 5 and 6 of the proposed draft legislation ("Z Draft") which has been distributed by your staff for industry feedback.

Section 5 of the "Z Draft"

NAMIC is concerned with the following aspects of Section 5 (1) (a) & (b):

- 1) These provisions are not part of the NAIC Model and place an over-emphasis on reporting data to the NAIC market information system;

- 2) The phrase "shall collect and report market data information . . ." (page 5, line 6) is somewhat nebulous in meaning and unnecessarily open-ended; and
- 3) The routine use the word "market" instead of "market conduct" is inconsistent with the scope and breadth of the national debate on market conduct reform, and needs to be fixed in all sections of the "Z draft".

Thus, NAMIC respectfully requests that Sections 5 (1) (a) & (b) be removed from the "Z draft".

NAMIC is concerned with the following aspect of Section 5 (2):

- 1) This section does not state that an insurance carrier is entitled to an administrative hearing prior to the commissioner suspending or revoking the carrier's certificate of authority.

NAMIC requests that the OIC specifically articulate, in detail, the procedural due process that an insurance carrier shall receive before any disciplinary action will be imposed.

NAMIC is concerned with the following aspects of Section 5 (3)(a) and (b):

- 1) The phrase "[t]he commissioner may request insurers to submit data and information that is necessary to conduct market analysis" is overly broad in that it suggests that the commissioner could force a carrier to disclose confidential information; and
- 2) The language of Section 5 (3)(a) does not provide for any verification that the information relied upon by the commissioner is objectively reliable, accurate and/or relevant to the assessment of a "baseline understanding of the marketplace".

NAMIC suggests that current draft of Sections 5 (3)(a) and (b) be replaced with the following language:

- (a) *The Commissioner shall gather information from data currently available to the Insurance Department, as well as surveys and required reporting requirements, information collected by the NAIC, information from within and outside the insurance industry from objective sources, information from websites for insurers, agents and other organizations and information from other sources, provided they are published at least annually in a bulletin or regulation, prior to use. [emphasis added to illustrate importance of objective reliability]*

- (b) Such information shall be analyzed in order to develop a baseline understanding of the marketplace and to identify for further review insurers or practices that deviate significantly from the norm or that may pose a potential risk to the insurance consumer.*

NAMIC is concerned with the following aspects of Section 5 (4)(a) and (b):

- 1) The use of the word "may" in Section 5 (4)(a)(line 36) is troubling, because it gives the commissioner unfettered discretion to skip over the continuum of market conduct actions and go directly to a market conduct examination. This sole discretionary power is inconsistent with the stated regulatory goal of promoting efficiency and uniformity in the exercise of regulatory powers under this Act. Further, insurance carriers and the department would benefit from the application of a structured and consistent procedural continuum of market conduct actions that is not subject to discretionary selection by the commissioner. Protecting the reasonable expectations of insurance carriers as to the procedural stages and process of the regulation is of paramount importance. Thus, the word "may" (on page 5, line 36 and on page 6, line 2) should be replaced with the word "shall" so that there is a reasonable degree of certitude as to how the regulations will be applied;
- 2) In Section 5 (4) (a) (vi), the review of the insurer's self-evaluation should be qualified to exclude mandatory disclosure of privileged and confidential information; and
- 3) Section 5 (4) does not set forth any statement as to the standard of review that the commissioner will utilize to determine when it is reasonable and appropriate to escalate the market conduct action to the level of a desk examination and/or investigation. Since one of the primary purposes of the proposed legislation is to create a regulatory process that eliminates the need for market conduct examinations except for extraordinary cases, there should be a provision that specifically addresses the circumstances that would justify the OIC conducting a desk examination and/or investigation.

NAMIC suggests that the current draft of Sections 5 (4)(a) and (b), and Sections 5 (5) and Section 5 (6) be replaced with:

(4)(a) The Commissioner shall use the following policies and procedures in performing the analysis required under this section:

- (i) Maintain an ongoing Market Analysis Chief (MAC);*
- (ii) Establish a systematic interdivisional communication program;*
- (iii) Identify key lines of business for systematic review;*

(iv) Identify companies for further analysis based on available information, including but not limited to:

(a) Complaint activity on justified complaints that indicates a potential harm to consumers;

(b) Significant changes in Direct Written Premium volume; and

(c) Significant changes or anomalies in reserves.

(4)(b) After completion of any level of Market Analysis, the state shall contact the insurer to verify the analysis prior to further market conduct action;

(A) Insurer specific information that is used and relied upon by the department when developing the baseline analysis and identifying insurers or practices for further review shall be substantiated by appropriate personnel in the department and verified by the insurer.

(B) The Commissioner may only utilize information from NAIC databases for market analysis provided that the Commissioner verifies the information directly with that state prior to its consideration.

(C) Except as otherwise specifically provided, the department or the Commissioner, as applicable, may not require an insurer to report information in a manner that is inconsistent with the records the insurer maintains in the ordinary course of business or can create at a reasonable expense or effort.

(4)(c) If the Commissioner determines, as a result of market analysis, that further inquiry into a particular insurer or practice is needed, the following continuum of market conduct actions shall be considered prior to conducting a targeted market conduct examination. The action selected shall be made known to the insurer in writing if the action involves insurer participation or response. These actions may include, but are not limited to:

(1) Correspondence with Insurer;

(2) Insurer Interviews;

(3) Information Gathering;

(4) Policy and Procedure Reviews;

(5) Interrogatories;

(6) Review of Insurer Self-Evaluation (if not subject to a privilege of confidentiality) and compliance programs, including membership in a best-practice organization;

- (7) *Desk examination; and*
- (8) *Investigation*

(4)(d) *The causes or conditions, if identified through market analysis that may trigger a targeted examination are:*

- (A) *Information obtained from a market conduct annual statement, market survey or report of financial examination indicating potential fraud, that the insurer is conducting the business of insurance without a license or is engaged in a potential pattern of unfair trade practice in violation of [cite statutory reference for the Unfair Trade and Claims Practices Acts].*
- (B) *A number of justified complaints against the insurer or a justified complaint ratio sufficient to indicate potential fraud, conducting the business of insurance without a license, or a potential pattern of unfair trade practice in violation of [cite statutory reference for the Unfair Trade and Claims Practices Acts]. For the purposes of this section, a complaint ratio shall be determined for each line of business.*
- (C) *Information obtained from other objective sources, such as published advertising materials indicating potential fraud, conducting the business of insurance without a license, or evidencing a potential pattern of unfair trade practice in violation of [cite appropriate statutory reference for the state's Unfair Trade and Claims Practices Act].*

(4)(e) *The Commissioner shall select a market conduct action that is cost effective for the Insurance Department and the insurer, while still protecting the insurance consumer.*

(5) *The Commissioner shall take those steps reasonably necessary to eliminate requests for information that duplicate or conflict with information provided as part of an insurer's annual financial statement, the annual market conduct statement of the National Association of Insurance Commissioners, or other required schedules, surveys, or reports that are regularly submitted to the Commissioner, or with data requests made by other states if that information is available to the Commissioner, unless the information is state specific, and coordinate market conduct actions and findings with other states.*

(6) *Except as otherwise specifically provided, the department or the Commissioner, as applicable, may not require an insurer to report information in a manner that is inconsistent with the records the insurer maintains in the ordinary course of business or can create at a reasonable expense or effort.*

Section 6 of the "Z Draft"

NAMIC is concerned with the following aspects of Section 6:

- 1) In regard to Section 6 (1), this provision needs to include a statement that clearly articulates that the scope of the market conduct analysis is not intended to "identify infrequent or unintentional, random errors that do not cause significant consumer harm." For the sake of efficiency and so as to avoid creating an undue administrative burden for insurers, this section must limit the scope of the market conduct analysis to the stated objective of protecting consumers from harm. Aberrational mistakes and errors that are an unavoidable part of operating a business should not be the direct or indirect focus of the market conduct analysis; and
- 2) In regard to Section 6 (3), NAMIC is concerned that the word "may" (page 7, line 5) provides the commissioner with the discretion to deny a carrier an opportunity to informally resolve a matter that was brought to their attention as a result of a market conduct analysis. Consequently, the word "may" should be replaced with the word "shall". Further, the provision should allow for a "reasonable opportunity to resolve the matter", not just an "opportunity to resolve the matter".

NAMIC suggests that Section 6 should be redrafted as follows:

- (1) Market conduct actions taken as a result of a market analysis shall focus on the general business practices and compliance activities of insurers, rather than identifying infrequent or unintentional random errors that do not cause significant consumer harm.*
- (2)(a) The Commissioner is authorized to determine the frequency and timing of such market conduct actions. The timing shall depend upon the specific market conduct action to be initiated, unless extraordinary circumstances indicating a risk to consumers require immediate action.*
- (2)(b) If the Commissioner has information that more than one insurer is engaged in common practices that may violate statute or regulations, the Commissioner may schedule and coordinate multiple examinations simultaneously.*
- (3) The insurer shall be notified of any practice or procedure which is to be the subject of a market conduct action and shall be given an opportunity to resolve matters that arise as a result of a market analysis to the satisfaction of the Commissioner before any additional market conduct actions are taken against the insurer. If the insurer has modified such practice or procedure as a result of a market conduct action taken by the Commissioner of another state, the Commissioner shall accept documentation that the insurer has satisfactorily*

modified the practice or procedure and made similar modification to such practice or procedure in this state.

(4) For any change made to an NAIC work product referenced in this Act, the Commissioner shall adopt by regulation procedures and documents that are substantially similar to the NAIC work products defined or referenced in this Act. Market analysis, market conduct actions and market conduct examinations shall be performed in accordance with such regulation. If any subsequent amendment to an NAIC work product defined or referenced in this Act materially changes the way in which market analysis, market conduct actions or market conduct examinations are performed, the Commissioner shall give notice and provide interested parties with an opportunity for a public hearing pursuant to (cite the appropriate state administrative procedures act) before such amendment is incorporated into the regulation. If no hearing is held, the Commissioner shall use the version of such work product most recently developed and adopted by the NAIC.

Thank you for affording NAMIC and the insurance industry an opportunity to provide comments on Sections 5 and 6 of the proposed "Z Draft". I look forward to working with you and the rest of the insurance industry on drafting this legislation.

Respectfully,

Christian John Rataj, Esq.
NAMIC Western State Affairs Manager

Jim Odiorne

From: Laurence, Jeffrey [jeffrey.laurence@symetra.com]
Sent: Wednesday, March 22, 2006 8:58 AM
To: Jim Odiorne
Cc: Kemper, Michele
Subject: Z- Draft Comments Sections 5 & 6

Jim,

Attached are Symetra's comments regarding Sections 5 & 6 of the Washington State Z-draft of the Market Conduct Surveillance Model Law in a tif file and a Microsoft Word file. I look forward to our discussion regarding these sections next week.

Thank you,

Jeffrey L. Laurence
Counsel
Symetra Life Insurance Company
Legal Department
(425) 256-5330
jeffrey.laurence@symetra.com

<<Z Draft Sec 5 - 6 Comment- Symetra.tif>> <<Z Draft Sec 5 - 6 Comment- Symetra.doc>>

3/22/2006

SYMETRA_{LLC}

FINANCIAL

Jeffrey L. Laurence
Counsel & Government Affairs
Legal Department SC-11
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jeffrey.laurence@symetra.com

March 22, 2006

Jim Odiorne
Deputy Insurance Commissioner
Washington State Office of the Insurance Commissioner
PO Box 40255
Olympia WA 98504-0255

Sent via e-mail and US Postal Service

RE: Market conduct Surveillance Model Act
Sections 5 & 6 of Z Draft

Dear Mr. Odiorne,

On behalf of Symetra Life Insurance Company and Symetra National Life Insurance Company (Symetra) both domestic life insurers in the state of Washington, I am happy to provide comments regarding Section 5 & 6 of the Z Draft. Generally, Symetra supports as much uniformity by each state with NAIC model language as possible. As a licensed attorney in the States of Washington and California I am aware of the unique challenges each state has in conforming model language into the style and statutory scheme that state has adopted.

Section 5, Market Analysis Procedures.

We have serious concerns with section 5. First, the variance from the model in section 5 is not a result of attempting to conform the model language to Washington style. The changes are substantive and include a new, Washington state specific, filing in subsection (2). The penalty for a late filing under subsection (2) requires the suspension or revocation of the certificate of authority for the insurer. While the commissioner may grant an extension, the tone of this section is chilling.

We propose that section 5 be changed to conform with section 4, Market Analysis Procedures in the NAIC model, and at the very least the language in subsection (2), "...shall suspend or revoke..." be replaced by "...may fine the entity or suspend or revoke..."

Very truly yours,

Jeffrey L. Laurence
Counsel & Government Affairs
Symetra Life Insurance Company
Symetra National Life Insurance Company

Jim Odiorne

From: Beth Berendt
Sent: Wednesday, March 22, 2006 9:35 AM
To: Jim Odiorne
Subject: FW: Ken Cooley/State Farm Comments on Z Draft Sections 5 & 6
Importance: High

Here are State Farm's comments.

-----Original Message-----

From: Janae Long [mailto:janae.long.cq5l@statefarm.com]
Sent: Wednesday, March 22, 2006 9:32 AM
To: Beth Berendt
Cc: Ken Cooley
Subject: Ken Cooley/State Farm Comments on Z Draft Sections 5 & 6

Dear Beth,

Per the request of Ken Cooley, please find attached State Farm's comments on sections 5 and 6 of the Z Draft.

<<Comments on Z Draft Sections 5 & 6.pdf>>

Janae Long
State Farm Insurance
Corporate Law West
(916) 321-6924

3/22/2006

State Farm Insurance Companies



March 22, 2006

Corporate Law West
1201 K Street, Suite 920
Sacramento, California 95814-3918

Kenneth Wm. Cooley
Counsel
Phone: (916) 321-6926
Fax: (916) 321-6905

The Honorable Mike Kreidler
Insurance Commissioner
State of Washington
5000 Capitol Way
Tumwater, Washington 98501

Re: Comments on Market Conduct Surveillance Model Act
Sections 5 and 6 of Z draft

Dear Commissioner Kreidler,

On behalf of the State Farm Insurance Companies, I am pleased to submit the following comments with respect to the proposed draft legislation ("Z Draft") which has been distributed by your staff.

A fundamental precept of the market conduct reform debate has been that the result of state-level reforms should be heightened efficiency of the regulatory process, both as affects the public fisc and its attendant costs upon the insurance marketplace. A key part of this has been the specific enumeration of powers, and new tools, which are designed to be exercised using credible information tools so that the regulatory activities are neither unduly burdensome nor ill-founded.

With Sections 5 and 6, substantial issues arise concerning how the Washington proposed bill fits with the current state of the market conduct reform debate. The following amendments are respectfully submitted to identify those aspects of the draft which present concern to the State Farm Insurance Companies.

Amendments 1a and 1b Discussion

A review of sections 5 (1) (a) & (b) discloses this language is not part of the NAIC Model and, as drafted, is very open-ended. In effect, changing NAIC requirements can become Washington reporting obligations without any public policy debate in the State of Washington, notwithstanding the fact that subdivision (b) imposes on the Washington OIC a

Letter by Kenneth Cooley: Comments on Market Conduct Surveillance Model Act
Sections 5-6 of Z draft

duty to collect data and maintain systems so that the NAIC's needs are served. In general, this type of open-ended delegation of state regulatory system design, and consequential budget implications, seems an unsound delegation of legislative prerogative, from both a public policy and a fiscal accountability standpoint.

Accordingly, we recommend these provisions be deleted (Amendment 1a), or, in the alternative, that at a minimum, references to market "conduct" be inserted as indicated in alternative Amendment 1b

Proposed Amendment 1a

On page 5, lines 5-12, delete as follows:

Sec. 5. MARKET ANALYSIS PROCEDURES. ~~(1)(a) The commissioner shall collect and report market data information to the NAIC's market information systems, including the complaint data base system, the examination tracking system, the regulatory retrieval system, other successor systems, or to additional systems as the commissioner determines is necessary for market analysis.~~

~~(b) Market data and information that is collected and maintained by the commissioner shall be compiled and submitted in a manner that meets the requirements of the NAIC and its systems.~~

Proposed Amendment 1b (alternative)

This language is not a part of the NAIC Model Act. If the Language is retained, then at lines, 6, 7, 10 & 11, after the word "market", insert "conduct".

Amendment 2 Discussion

The purpose of Amendment 2 is to assure that the exercise of regulatory powers provided for by this act are founded upon information currently available to the commissioner or information that has been officially requested, or is required to be reported and as to the information, it should meet the standard of being objectively verifiable data which is subject to independent scrutiny. This serves the purpose of ensuring that the exercise of powers provided by this Act is based upon information that is well-founded so as to further the goals of efficiency and effectiveness.

As a caveat, the last sentence of the existing provision in the Z Draft is objectionable as a very open-ended power. The power to compel data reports for "market analysis" is extraordinarily broad and one cannot, in reading this new duty, foresee how it can be limited, as worded. Furthermore, it is unclear what the intended differentiation is between "data" and "information". This too draws attention to the extremely open-ended character of this new proposed power.

Proposed Amendment 2

On page 5, lines 22-27, revise as follows:

(3)(a) The commissioner shall gather information from data currently available to the commissioner, as well as surveys and required reporting requirements reports, information collected by the NAIC, information from within and outside the insurance industry from objective sources, information from websites for insurers, agents and other organizations and information from other sources, provided they are published at least annually in a bulletin or regulation, prior to use. ~~other sources in both the public or private sectors, and information from within and outside the insurance industry. The commissioner may request insurers to submit data and information that is necessary to conduct market analysis.~~

Amendment 3 Discussion

The purpose of the revised Section (4)(a) in Amendment 3 is to clarify that insofar as the NAIC Market Conduct effort is evolving, the establishment of a new program in Washington should be anchored in some fixed and determinable policies and ground rules, rather than merely incorporating by reference a document that is undergoing evolutionary change. The proposed amendment reflects substantive rules within the current Market Conduct Handbook but exposes those rules and policies to Washington legislative scrutiny.

Sections (4) (b), (c), (d) and (e) are requested by State Farm as furthering the efficiency goals of the exercise of new powers under this Act by ensuring there is a reasonable expectancy among all parties that data being used, and required to be provided, is accurate, well-founded, and not unduly burdensome for marketplace participants to assemble.

Proposed Amendment 3

On page 5, line 29, after "the", insert "insurance", on line 31, strike the second occurrence of the word "The", and strike lines 32 and 33 as follows, "The commissioner shall use the NAIC market analysis handbook as one resource in performing this analysis." and on line 34, strike "(4)", and insert:

(4)(a) The Commissioner shall use the following policies and procedures in performing the analysis required under this section:

(i) maintain an ongoing Market Analysis Chief (MAC);

(ii) establish a systematic interdivisional communication program;

(iii) identify key lines of business for systematic review;

(iv) identify companies for further analysis based on available information, including but not limited to:

(a) complaint activity on justified complaints that indicates a potential harm to consumers;

(b) significant changes in Direct Written Premium volume; and

- (c) significant changes or anomalies in reserves.
- (b) After completion of any level of Market Analysis, the state shall contact the insurer to verify the analysis prior to further market conduct action;
- (c) Insurer specific information that is used and relied upon by the department when developing the baseline analysis and identifying insurers or practices for further review shall be substantiated by appropriate personnel in the department and verified by the insurer.
- (d) The Commissioner may only utilize information from NAIC databases for market analysis provided that the Commissioner verifies the information directly with that state prior to its consideration.
- (e) Except as otherwise specifically provided, the department or the Commissioner, as applicable, may not require an insurer to report information in a manner that is inconsistent with the records the insurer maintains in the ordinary course of business or can create at a reasonable expense or effort.
- (5)

Amendment 4 Discussion

Amendment 4 carries forward the concern, addressed in our prior comment letter, that the proposed law's focus should be upon market "conduct". In addition, the changing of the "may" to "shall" is offered as the means to ensure that Washington carries forward the "continuum of regulatory actions" that has become a centerpiece of the reform discussions in the NAIC and elsewhere.

Proposed Amendment 4

On page 5, line 36, after "market" insert "conduct" and strike "may, and insert "shall"

Amendment 5 Discussion

Amendment 5 is intended to more fully address the concern that insurers not be subjected to duplicative reporting burdens when an alternative means of obtaining the information is reasonably available.

Proposed Amendment 5

On page 6, strike lines 20, 21, and 22 as follows:

~~(5) The commissioner shall take those steps reasonably necessary to eliminate duplicative inquiries and coordinate market conduct actions and findings with other state insurance regulators.~~

and insert:

(6) The Commissioner shall take steps reasonably necessary to eliminate requests for information that duplicate or conflict with information provided as part of an

insurer's annual financial statement, the annual market conduct statement of the National Association of Insurance Commissioners, or other required schedules, surveys, or reports that are regularly submitted to the Commissioner, or with data requests made by other states if that information is available to the Commissioner, unless the information is state specific, and coordinate the market conduct actions and findings of this state with other states.

Amendment 6 Discussion

Amendment 6 proposes the addition of language to identify three classes of specific findings, or similarly well-founded concerns for possible fraudulent conduct or violation of law, which are intended to form the basis for the initiation of a targeted examination.

Proposed Amendment 6

- (7) The causes or conditions, if identified through market analysis, that may trigger a targeted examination are:
- (A) Information obtained from a market conduct annual statement, market survey or report of financial examination indicating potential fraud, that the insurer is conducting the business of insurance without a license or is engaged in a potential pattern of unfair trade practice.
 - (B) A number of justified complaints against the insurer or a justified complaint ratio sufficient to indicate potential fraud, conducting the business of insurance without a license, or a potential pattern of unfair trade practice in violation of law. For the purposes of this section, a complaint ratio shall be determined for each line of business.
 - (C) Information obtained from other objective sources, such as published advertising materials indicating potential fraud, conducting the business of insurance without a license, or evidencing a potential pattern of unfair trade practice in violation of law.

Amendment 7 Discussion

Amendment 7 is a technical re-numbering.

Proposed Amendment 7

On page 6, line 23, strike "(6)" and insert "(7)"

Amendments 8 & 9 Discussion

Amendments 8 and 9 carry forward the concern, identified in our first comment letter, that the scope of the act should be targeted to market "conduct" matters.

Proposed Amendment 8

**On page 6, line 29, after the first occurrence of the word "MARKET" insert
"CONDUCT"**

Proposed Amendment 9

**On page 6, line 29, after the second occurrence of the word "Market", insert
"conduct"**

Amendment 10 Discussion

Amendment 10 is intended to incorporate the language of the NAIC model which makes clear regulators should focus on broad patterns and trends rather than infrequent and evidently unintentional errors.

Proposed Amendment 10

Page 6, line 32, following "insurers", insert "rather than identifying infrequent or unintentional random errors that do not cause significant consumer harm"

Amendment 11 Discussion

Amendment 11 also reflects the concern, identified in our first comment letter, that the scope of the act should be targeted to market "conduct" matters.

Proposed Amendment 11

On page 6, line 34, after "market" insert "conduct"

Amendment 12 Discussion

Amendment 12 is proposed to establish that collaboration in the regulation of insurance in the State of Washington is the norm and to establish that the duties and obligations of that collaboration are a two-way street, involving notice of concerns, and an opportunity to

address matters to the Commissioner's satisfaction without recourse to further regulatory intervention.

Proposed Amendment 12

On page 7, line 5, strike "may" and insert "shall" and on line 8, after "insurer", insert:

The insurer shall be notified of any practice or procedure which is to be the subject of a market conduct action and shall be given an opportunity to resolve matters that arise as a result of a market analysis to the satisfaction of the Commissioner before any additional market conduct actions are taken against the insurer. If the insurer has modified such practice or procedure as a result of a market conduct action taken by the Commissioner of another state, the Commissioner shall accept documentation that the insurer has satisfactorily modified the practice or procedure and made similar modification to such practice or procedure in this state.

Amendment 13 Discussion

Amendment 13 also reflects the concern, identified in our first comment letter, that the scope of the act should be targeted to market "conduct" matters.

Proposed Amendment 13

On page 7, line 10, after "market", insert "conduct"

Amendment 14 Discussion

Amendment 14 has the purpose of providing clarity as to the general procedures, rules, and documentation that will form the basis for Washington market conduct activities by anchoring these procedures explicitly in state regulations that are substantially similar to NAIC work products. This provides for reasonable foreseeability on the part of regulated entities.

Proposed Amendment 14

On page 7 revise lines 9 through 14 to read as follows:

(4) The commissioner shall adopt by regulation procedures and documents that are substantially similar to the NAIC work products defined or referenced in this chapter. Market analysis, market actions and market conduct examinations shall be performed in accordance with such regulation. For any change made to an NAIC work product referenced in this chapter that materially changes the way in which market analysis, market actions or market conduct examinations are conducted, the commissioner may

Letter by Kenneth Cooley: Comments on Market Conduct Surveillance Model Act
Sections 5-6 of Z draft

~~shall~~ given notice and provide parties with an opportunity for a public hearing under chapter 34.05 RCW, ~~or the commissioner may use the versions of the work products most recently developed and adopted by the NAIC before such amendment is incorporated into the regulation. If no hearing is held, the commissioner shall use the version of such work product most recently developed and adopted by the NAIC.~~

Thank you for the opportunity to provide comment on these portions of the proposed Z Draft.

I look forward to participating in next week's discussion of these matters.

Sincerely,

Ken Cooley/pc

Kenneth Cooley
Counsel

Jim Odiorne

From: Pelovitz, Betsy [BPelovitz@ahip.org]
Sent: Wednesday, March 22, 2006 11:10 AM
To: Jim Odiorne
Cc: sorensen@carneylaw.com; Jones, Christian; Beth Berendt
Subject: AHIP Comment Letter on Sections 5 and 6 of OIC Z draft on Market Conduct

Deputy Commissioner Odiorne-

Please accept the attached written comments, and accompanying materials, on behalf of America's Health Insurance Plans (AHIP) regarding the sections 5 and 6 of the Office of the Insurance Commissioner's z-draft on market conduct.

Feel free to contact me with any questions.
Thank you.
Betsy

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3/22/2006

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March 22, 2006

Deputy Commissioner James Odiorne
Washington State Office of the Insurance Commissioner
5000 Capitol Way
Tumwater, Washington 98501

Re: Market Conduct Surveillance Model Act
Sections 5 and 6 of Z draft

Dear Deputy Commissioner Odiorne:

On behalf of America's Health Insurance Plans (AHIP), we appreciate the opportunity to comment on the Office of the Insurance Commissioner's (OIC's) efforts to develop a legislative proposal for a Market Conduct Surveillance Model Act. AHIP is the national trade association representing nearly 1,300 member companies providing health insurance coverage to more than 200 million Americans.

We appreciate the OIC's efforts to adopt language that incorporates the uniform standards developed by the National Association of Insurance Commissioners (NAIC) and the National Council of Insurance Legislators (NCOIL) with respect to state market analysis and market conduct programs. Please accept this correspondence in response to your request for comments on sections 5 and 6 of the OIC's Z draft. Our suggested deletions are highlighted with ~~striketrough text~~ and our requested additions are highlighted in underlined text. Thank you for time and consideration of these comments.

Section 5 – Market Analysis Procedures

It is important to note that all entities that would be subject to this new chapter of Washington state law are not currently required to participate in the NAIC's Market Conduct Annual Statement project. This project only applies to life and annuity and property and casualty products; therefore, we respectfully request that subsection (2) of the Section 5 of the OIC's z-draft be modified. The below suggested language clarifies that only those entities who are subject to the NAIC's project are required to shall the market conduct annual statement. We further note that the recommended changes allow for the expansion of the project – and the accompanying requirement to file the statement – without the need for future amendments to this statute. We also suggest that the an entity's certificate of authority should not be subject to suspension or revocation during an approved extension of time. Instead, we recommend that revocation and/or suspension would be more appropriate at the conclusion of the granted extension period if non-compliance occurs.



(2) Each entity subject to the NAIC's Market Conduct Annual Statement project ~~provisions of this chapter~~ shall file a market conduct annual statement in the general form and context, in the time frame required by, and according to instructions provided by the NAIC. The commissioner shall suspend or revoke the certificate of authority or other authorizing document of any entity that fails to file its market conduct annual statement when due to at the conclusion of an approved ~~during any~~ extension of time therefore, which the commissioner for good cause, may grant.

We submit the following recommended changes to subsection 3(a) of section 5 to require that the sources that are relied upon by the commissioner are objective and are shared with the industry on an annual basis prior to use. This enhances the transparency of the regulatory process and provides notification to the marketplace of the different measures that the commissioner will be relying upon when conducting market analysis. In addition, the publication of this information will help to mitigate the potential consumer harm by providing carriers with the opportunity to self-evaluate, identify potential areas of concern, and remedy these potential problems as soon as possible. Finally, we note that the intention of market analysis is for state regulators to use information that is readily available rather than requesting additional information from insurers. Therefore, we respectfully request that the language granting the commissioner the authority to request additional data from insurers for market analysis purposes be removed.

(3)(a) The commissioner shall gather information from data currently available to the commissioner, as well as surveys and ~~required reporting requirements~~, information collected by the NAIC, information from within and outside the insurance industry from objective sources, information from websites for insurers, agents and other organizations and information from other sources, provided they are published at least annually in a bulletin or regulation, prior to use. ~~other sources in both the public and private sectors and information from within and outside the insurance industry.~~ ~~The commissioner may request insurers to submit data and information that is necessary to conduct market analysis.~~

As was discussed briefly during the March 15, 2006, conference call, there are lingering industry concerns regarding the newly-developed NAIC Market Analysis Handbook. We continue to work with the NAIC to address these matters and respectfully request that the reference to this Handbook be removed and replaced with the following standards that are incorporated into the Handbook.

(b) The information shall be analyzed in order to develop a baseline understanding of the marketplace and to identify for further review insurers or practices that deviate significantly from the norm or that may pose a potential risk to the insurance consumer. ~~The commissioner shall use the NAIC market analysis handbook as one resource in~~



~~performing this analysis.~~ The Commissioner shall use the following policies and procedures in performing the analysis required under this section:

- (i) Maintain an ongoing Market Analysis Chief (MAC):
- (ii) Establish a systematic interdivisional communication program:
- (iii) Identify key lines of business for systematic review:
- (iv) Identify companies for further analysis based on available information, including but not limited to:
 - (a) Complaint activity on justified complaints that indicates a potential harm to consumers;
 - (b) Significant changes in Direct Written Premium volume; and
 - (c) Significant changes or anomalies in reserves.

In order to achieve true uniformity for market analysis and market conduct, it is critical that discretion be limited in appropriate circumstances. This ensures consistency in process and also sets clear expectations among all parties. We therefore recommend that “may” be changed to “shall” under subsection 4(a).

(4)(a) If the commissioner determines, as a result of market analysis, that further inquiry into a particular insurer or practice is needed, the following continuum of market conduct actions ~~may~~ shall be considered before conducting a market conduct examination.

We also request the inclusion of language in subsection 4 to clarify that the references to insurer self-evaluations should not be construed to require disclosure of otherwise confidential or privileged materials. In order to engage in a meaningful self-evaluation, health plans and insurers must review sensitive internal operations. Reviews often include privileged legal advice from lawyers; confidential information, including financial and health information from enrollees; complaint information by and about providers; and peer-review materials and other documents that may be covered under a number of privileges, including attorney-client and trade secret privileges. In addition, many documents included as part of the review may contain confidential information about third parties, including health care providers and patients. Therefore, we suggest that the following language be incorporated as a new provision under subsection 4:

NEW (c) Notwithstanding the provisions of this section, no insurer shall be compelled to disclose a self-evaluation document or waive any statutory or common law privilege, but may voluntarily disclose such document to the commissioner in response to any market action or examination.



One of the goals of the regulatory reform modernization efforts is to conserve and focus resources by increasing the efficiencies and decreasing costs associated with the regulatory process by eliminating duplicate and/or conflicting requests for information. We appreciate the OIC's efforts to incorporate language into the Model to address this matter; however, we respectfully recommend that this provision be expanded beyond market actions to include all documents and required reports that are submitted by insurers to the OIC. In addition, we suggest that language be included limiting an insurer's obligation to report information in a manner that is inconsistent with the records that are maintained in the ordinary course of business.

(5)(a) The commissioner shall take those steps reasonably necessary to eliminate duplicative inquiries and coordinate market conduct actions and findings with other state insurance regulators requests for information that duplicate or conflict with information provided as part of an insurer's annual financial statement, the annual market conduct statement of the National Association of Insurance Commissioners, or other required schedules, surveys, or reports that are regularly submitted to the Commissioner, or with data requests made by other states if that information is available to the Commissioner, unless the information is state specific, and coordinate market conduct actions and findings with other states.

NEW(b) Except as otherwise specifically provided, the commissioner may not require an insurer to report information in a manner that is inconsistent with the records the insurer maintains in the ordinary course of business or can create at a reasonable expense or effort.

We note that the language incorporated into subsection 6 of the OIC's z-draft mirrors the current language found in RCW 48.03.010(6) and we question whether both statutory requirements are necessary. We suggest that a repeal of RCW 48.03.010(6) be incorporated into OIC's z-draft to eliminate duplicate requirements and the potential for confusion should one, but not both, sections be modified in the future.

As noted in our March 8, 2006, comment letter on new provisions there is additional language on data verification and complaint reconciliation that should be added to the draft to ensure that Washington's market analysis program achieves the goals of increased efficiencies and cost savings that the reform efforts are intended to create for state regulators and the industry. AHIP specifically requests the inclusion of a new provision under section 5 that requires the development of a data verification and complaint reconciliation process for information that is relied upon when a state is conducting its baseline market analysis.

An important aspect of state market analysis programs is the sharing of consumer complaint and market analysis data among the states, which regulators increasingly rely upon to guide their



investigatory and enforcement actions. Unfortunately, insurers have increasingly found that the data relied on can contain significant inaccuracies that can result in the attribution of complaints to the wrong company or product type, higher complaint ratios based on incorrect premium numbers, and incorrect market analysis conclusions. The use of inaccurate data leads to the misallocation of regulatory resources and can be damaging to an insurer's reputation. Therefore, we strongly recommend the creation of a process to improve data accuracy that incorporates verification of the information by the company or entity under review. Regulators handle enormous amounts of information on a daily basis and do not have the luxury of devoting resources to double checking complaints against or information about each and every regulated entity. Allowing companies to review data is the most efficient way to make sure information is accurate because they have every incentive to assure that the basic facts are correct and will apply resources necessary to complete reviews in a timely and efficient manner. Our recommended language to address this issue follows, and we suggest that it be incorporated as a new provision under the Market Analysis Procedures section.

NEW (7) After completion of any level of Market Analysis, the state shall contact the insurer to verify the analysis prior to pursuing further market action;

- (1) Insurer specific information that is used and relied upon by the department when developing the baseline analysis and identifying insurers or practices for further review shall be substantiated by appropriate personnel in the department and verified by the insurer.*
- (2) The Commissioner may only utilize information from NAIC databases for market analysis provided that the Commissioner verifies the information directly with that state prior to its consideration.*
- (3) Except as otherwise specifically provided, the department or the Commissioner, as applicable, may not require an insurer to report information in a manner that is inconsistent with the records the insurer maintains in the ordinary course of business or can create at a reasonable expense or effort.*

Section 6 – Protocols for market actions

We respectfully request the modification of subsection 1 of section 6 of the OIC's z-draft to clarify that market actions should not be pursued for infrequent or unintentional random errors that do not cause significant consumer harm. This additional language supports the goals of regulatory reform to conserve and focus resources on general business practices. We note that this language was included in both the industry-revised model and the NAIC – NCOIL joint Market Conduct Surveillance Model.



(1) Market actions shall be taken as a result of market analysis and shall focus on the general business practices and compliance activities of insurers, rather than identifying infrequent or unintentional random errors that do not cause significant consumer harm.

AHIP also believes it important that insurers be given the opportunity to resolve any matters to the satisfaction of the Commissioner before additional market actions are taken. This promotes efficiencies for both the insurer and the Commissioner by potentially avoiding further action. As noted above, AHIP also recommends that enhanced transparency be incorporated into the draft to provide insurers with notice and information regarding market actions that are being pursued against the insurer. We therefore respectfully request the modification of subsection 3 to require that the insurer be given an opportunity to resolve matters and receive notice of the practice or procedure that is the subject of the market action. In addition, to further the collaboration and coordination among states and to reduce duplicative efforts, we believe it is critical for the commissioner to rely upon actions taken by other states and to accept documentation of modifications to processes or procedures when a similar modification is made to the practice or procedure in Washington State.

(3) The insurer ~~may~~ shall be given an opportunity to resolve matters that arise as a result of a market analysis to the satisfaction of the commissioner before any additional market ~~conduct~~ actions are taken against the insurer. The insurer shall be notified of any practice or procedure which is to be the subject of a market action and shall be given an opportunity to resolve matters that arise as a result of a market analysis to the satisfaction of the Commissioner before any additional market actions are taken against the insurer. If the insurer has modified such practice or procedure as a result of a market action taken by the Commissioner of another state, the commissioner shall accept documentation that the insurer has satisfactorily modified the practice or procedure and made similar modification to such practice or procedure in this state.

Our final suggested change to ensure uniformity and enhance transparency is to the language in subsection 4 regarding the adoption and use of NAIC work products. AHIP believes that it is important to provide interested parties with the required notice and opportunity for hearing when NAIC work products are incorporated into Washington state regulations. We strongly recommend that this process be mandatory for material changes and that the notice and public hearing occur prior to any amendments being incorporated into the rules.

(4) The commissioner shall adopt by regulation procedures and documents that are substantially similar to the NAIC work products defined or referenced in this chapter. Market analysis, market actions and market conduct examinations shall be performed in accordance with such regulation. For any change made to an NAIC work product referenced in this chapter that materially changes the way in which market analysis, market actions or market conduct examinations are conducted, the commissioner may

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shall given notice and provide parties with an opportunity for a public hearing under chapter 34.05 RCW, or the commissioner may use the versions of the work products most recently developed and adopted by the NAIC before such amendment is incorporated into the regulation. If no hearing is held, the commissioner shall use the version of such work product most recently developed and adopted by the NAIC.

Thank you for the opportunity to provide comments on this matter and we look forward to continuing to work with the OIC on this legislative proposal. Please feel free to contact us with any questions or concerns.

Sincerely,

Betsy M. Pelovitz
Regional Director

cc: Melvin Sorenson, Carney Badley Spellman, PS

Jim Odiorne

From: AWHP [AWHP@comcast.net]
Sent: Wednesday, March 22, 2006 11:44 AM
To: Jim Odiorne
Cc: Beth Berendt
Subject: Market Analysis Z-Draft Sec 5 & 6 Comments



Jim

Thank you for the opportunity to provide AWHP's comments (attached) regarding Sections 5 & 6 of the OIC's Market Analysis Z-Draft bill.

Please don't hesitate to give me a call (425-396-5375) if I can answer any questions, or if you would like to discuss.

Sydney

Association of Washington Healthcare Plans
Sydney Smith Zvara, Executive Director
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3/22/2006



The Association of Washington Healthcare Plans

March 22, 2006

Sent via E-Mail & U.S. Postal Service

Jim Odiorne
Deputy Insurance Commissioner
Washington State Office of Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

Re: Market Analysis Z-Draft
Sections 5 & 6

Dear Jim,

On behalf of AWHP's member healthcare plans, we appreciate the opportunity to comment on the Office of Insurance Commissioner's (OIC's) efforts to develop a legislative proposal for Market Regulation and Surveillance. We would like to note, initially, that the overall reservations we have previously expressed regarding the need for and scope of the legislative proposal continue to apply.

In accordance with the OIC's Market Analysis Project schedule, we offer the following comments and suggestions regarding Sections 5 & 6 of the proposed draft, for your consideration. I believe you will find them in agreement with the more detailed comments and suggestions submitted by America's Health Insurance Plans (AHIP).

Section 5 – Market Analysis Procedures

We suggest modifying Section 5 subsection (2) to help clarify that only those entities who are subject to the NAIC's model conduct annual statement project are required to file a market conduct annual statement.

To enhance transparency of the regulatory process and provide notification of the measures the OIC will be replying upon, we suggest adding language to subsection (3) (a) that states the sources relied upon by the commissioner must be objective, and that they are shared with the industry on an annual basis prior to use. We also suggest removing the language in this subsection that grants the commissioner authority to request additional data from insurers, since the intention of market analysis is for state regulators to use already available information. Additionally, we recommend replacing the reference that incorporates the NAIC Market Analysis Handbook with a statement of the actual policies and procedures to be used.

In support of true uniformity for market analysis and market conduct, we agree with AHIP's suggestion that the word "may" be replaced with "shall" in subsection (4) (a) that deals with regulatory discretion.

We strongly suggest that subsection (5) be expanded to clarify that insurers will not be required to provide information otherwise available in the form of documents, filings, and required reports submitted by insurers to the OIC. We also recommend adding language to limit an insurer's obligation to report information in a manner inconsistent with the records that are maintained in the ordinary course of

business. These changes are in accordance with the goals of increased efficiency and eliminating duplication of efforts.

As part of our review of the proposed legislation, we note that language incorporated in subsection (6) mirrors language in the existing statute. As indicated in our March 8th letter, we continue to be concerned that the proposed draft will not replace existing market conduct examinations but rather will overlay the current structure with yet another process for examining carriers' market practices. Creating a new additional process is not the best way to develop an efficient system for evaluating carrier's performance. We believe that the proposed legislation must include appropriate repealers of existing overlapping statutory authority even if some of the repealers have delayed effective dates to address the Commissioner's concerns about the need for a transition to the new surveillance practices.

We are in agreement with the suggestion contained in AHIP's letter that as an important part of the proposed legislation, a new process should be created under Section 5 to improve consumer complaint data accuracy. It is important that this process incorporate verification of information by the company or entity under review to, at a minimum, ensure the accuracy of basic facts such as attribution to the correct company or product type.

Section 6 – Protocols for Market Actions

We recommend addition of language to clarify that market actions should not be pursued for infrequent or unintentional random errors, and that insurers be allowed to resolve any matters.

To enhance transparency, we also suggest adding language confirming that an insurer will be notified and provided information regarding any market actions that are being pursued against the insurer. We also support AHIP's recommendation that the OIC rely upon actions taken by other states and to accept documentation of modification to processes or procedures when a similar modification is made to the practice or procedure in Washington State.

We also agree with the suggestion that subsection (4) be modified to provide interested parties with notice and opportunity for hearing when NAIC work products are incorporated into Washington state regulations.

Again, we appreciate the opportunity to work with you and hope these comments and suggestions will be of assistance.

Sincerely,

Sydney Smith Zvara
Executive Director

Jim Odiorne

From: mary_rountree@farmersinsurance.com
Sent: Wednesday, March 22, 2006 1:30 PM
To: Jim Odiorne
Cc: bennett_katz@farmersinsurance.com; mike.kapphahn@farmersinsurance.com;
burt_garavaglia@farmersinsurance.com
Subject: WA. Proposed Market Regulation & Surveillance Bill



WA. Market
Surveillance Comments

Dear Mr. Odiorne:

Please see our comments regarding the above proposal. I will be FAXing the signed copy to your attention. Let me know if you have any questions or if I can be of any further assistance.

Thank you!

(See attached file: WA. Market Surveillance Comments 03-22-06.doc)

Mary Rountree
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March 22, 2006

Jim Odiorne
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Company Supervision
Washington Office of the Insurance Commissioner
P. O. Box 40258
Olympia, WA 98504-0258

RE: Market Regulation and Surveillance -- Proposed Bill

Dear Mr. Odiorne:

We appreciate the opportunity to comment on sections 5 & 6 of the proposed Market Regulation and Surveillance Bill.

Our main concern is the wording under section 5, line 17, which states "The commissioner shall suspend or revoke the certificate of authority...". We believe there should be some discretion used here and the wording changed to "may suspend or revoke...". Since the language under line 20 allows for approved extensions, the commissioner should be allowed this discretion.

Also under section 5, on line 25, we do not agree with the wording regarding gathering information "from within and outside the insurance industry." We believe this is too broad and leaves the door open to consumer groups interested in specific studies. We do not believe that these outside groups would be required to comply with such requests, since they are not regulated by the Insurance Department.

We do appreciate the language under section 5 (on page 6), lines 16-17, that "the commissioner shall select the least intrusive and most cost-effective market action...". With fewer resources at the insurance departments, as well as most companies, it would benefit all parties to execute this method of market activity.

Please feel free to contact me or Mary Rountree of my staff at (323) 932-3965, should you have any questions.

Sincerely,

Bennett L. Katz
AVP - Regulatory Affairs

Jim Odiorne

From: kenton.brine@pciaa.net
Sent: Thursday, March 23, 2006 1:22 AM
To: Jim Odiorne
Cc: Beth Berendt; sorensen@carneylaw.com
Subject: Fw: Washington Z Draft Sections 5/6 Comments

Jim -

Please see below PCI's comments on the first four sections of the OIC's draft legislation on market analysis, prepared by Don Cleasby, PCI Vice President, Regional Manager and Counsel .. We look forward to working with the department to address industry concerns. Please let me know if you need further information on PCI's comments.

Thank you.

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Property Casualty Insurers Association of America
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March 22, 2006

Mr. Jim Odiorne
Deputy Commissioner, Market Conduct
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Olympia, WA 98504

Re: Draft Legislation on Market Regulation and Surveillance, Sections 5&6

Dear Mr. Odiorne:

The Property Casualty Insurers Association of America (PCI) appreciates this opportunity to provide the Department with comments on the draft Market Regulation and Surveillance Law. This email provides continued comments from PCI regarding Sections 5 and 6 of the draft.

SECTION 5

Section 5 (1)(a) establishes the groundwork for market regulation based on market analysis. Because market analysis is only as good as the data analyzed, the PCI urges that the following two sentences be added:
"Complaints reported to the Complaint Database system shall be justified complaints that have been substantiated by appropriate personnel in the Insurance Department and by the insurer that is the subject of the

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complaint. In addition to complaint data, insurer specific information reported to the NAIC for market analysis and market conduct purposes shall be substantiated by appropriate personnel in the department and verified by the insurer". This "double check" system will assure better that any market action taken on an insurer is based on information that is in fact true and accurate. The PCI is also aware that concern over discrepancies in what complaint information is reported to the NAIC has resulted in the NAIC forming a new (D) Committee working group to look into this problem.

Section 5 (2) calls for license suspension or revocation for an insurer that fails to file a market conduct annual statement when due. This seems an extreme sanction. At a minimum, the statute should give the commissioner the ability to decide between license action or some other penalty. The PCI also notes that the term "market conduct annual statement" is not defined in Section 4 whereas other NAIC work products are.

Section 5 (3) (a) allows the commissioner to use information in market analysis that comes from sources in both the public or private sectors and from within and outside of the insurance industry. These are broad and undefined terms. Again, it is imperative that any data used in market analysis are accurate and unbiased. In addition, an insurer that is the subject of a market action should be able to review this information. Therefore, the PCI recommends that this be reworded as "other objective sources in both the public or private sectors and objective information from within and outside the insurance industry provided that the sources and information are published at least annually in a bulletin or regulation, prior to use".

Section 5 (3) (b) mentions the NAIC market analysis handbook in the last sentence. The PCI recommends that the procedures set forth in the handbook be specifically spelled out in statute rather than merely referenced by way of the Handbook. Therefore, we recommend the deletion of this last sentence and substitute is a new Section 5 (3) (c) reading: "The commissioner shall use the following policies and procedures in performing the analysis required under this section: (i) Maintain an ongoing Market Analysis Chief; (ii) Establish a systematic interdivisional communication program; (iii) Identify key lines of business for systematic review; (iv) Identify companies for further analysis based on available information, including but not limited to complaint activity on justified complaints that indicates a potential harm to consumers, significant changes in Direct Written Premium volume and significant changes or anomalies in reserves." This language follows the procedures set forth in the Handbook and does not preclude the use of the Handbook. However, it does establish the statutory foundation for market analysis to assure that the Department's market regulation program is truly one based on market analysis.

A new **Section 5 (3) (d)** is needed to once again address the issue of the accuracy of information relied upon in market analysis. The new sections would read: "After completion of any level of market analysis, the commissioner shall contact the insurer to verify the analysis prior to further market action; (i) Insurer specific information that is used and relied upon by the commissioner when developing the baseline analysis and identifying insurers or practices for further review shall be substantiated by appropriate personnel in the department and verified by the insurer. (ii) The commissioner may only utilize information from NAIC databases for market analysis provided that the commissioner verifies the information directly with the state prior to its consideration. (iii) Except as otherwise specifically provided, the department or the commissioner, as applicable, may not require an insurer to report information in a manner that is inconsistent with the records the insurer maintains in the ordinary course of business or can create at a reasonable expense or effort".

Section 5 (4) (a) states that the commissioner "may" consider the continuum of market actions. That should be "shall". One of the main purposes in developing the model law was to reroute market regulation away from periodic and automatic comprehensive examinations of insurers to a system in which market analysis is used to target market regulation and use market actions best suited to deal with a specific insurer or issue in the most effective and expedient way possible. Leaving it to the commissioner's discretion not to use the continuum allows the status quo. Market regulation reform is lost.

Section 5 (4) (a) (vi) recognizes the value of both self-evaluation and compliance programs and best practices organizations. The PCI applauds the inclusion of these two areas in the legislation.

Section 5 (4) (b) allows the commissioner to avoid using the least intrusive and most cost-effective market action in extraordinary circumstances. This should be "extraordinary circumstances indicating a risk to consumers" as is used in Section 6 (2)(a). In addition, the reference to least intrusive should read "least intrusive and most cost-effective market action for the department and insurer".

Section 5 (6) grants examination or other market action authority over MGAs or "other person". That again is very broad. The commissioner should only have such authority over entities that fall within his or her regulatory authority under the Insurance Code.

A **new Section 5 (7)** is needed to spell out what factors trigger a targeted market conduct examination. We recommend the following: "The causes or conditions, if identified through market analysis, that may trigger a targeted examination are: (a) Information obtained from a market conduct annual statement, market survey or report of financial examination indicating potential fraud, that the insurer is conducting the business of insurance without a license or is engaged in a potential pattern of unfair trade practice in violation of [cite statutory reference for the Unfair Trade and Claims Practices Act]; (b) A number of justified complaints against the insurer or a justified complaint ratio sufficient to indicate potential fraud, conducting the business of insurance without a license, or a potential pattern of unfair trade practice in violation of [cite statutory reference for the Unfair Trade and Claims Practices Act]. For purposes of this section, a complaint ratio shall be determined for each line of business; or (c) Information obtained from other objective sources, such as published advertising materials indicating potential fraud, conducting the business of insurance without a license, or evidencing a potential pattern of unfair trade practice in violation of [cite appropriate statutory reference for the state's Unfair Trade and Claims Practices Act]".

SECTION 6

Section 6 (1) should add to the end of the sentence "rather than identifying infrequent or unintentional random errors that do not cause significant consumer harm". Once again, such language creates the statutory foundation needed to redirect market analysis and market regulation to those insurers and those insurance issues that most need regulatory attention.

Section 6 (3) should change the first "may" to "shall". Insurers should have a chance to mitigate issues and resolve matters. This should not be left to the commissioner's discretion. The language requires that any resolution must meet with the commissioner's satisfaction. This gives the commissioner the authority to deny or reject any resolution proposed by the insurer. In addition, the concept of deference to other regulators should be recognized in this section. If the insurer has altered a practice or procedure as a result of a market action of another regulator and that alteration occurred in Washington as well, the Washington Department should defer to the market action of the other regulator. We recommend adding as a new sentence to Section 6 (3) the following: "If the insurer has modified such practice or procedure as a result of a market conduct action taken by the Commissioner of another state, the Commissioner shall accept documentation that the insurer has satisfactorily modified the practice or procedure and made similar modification to such practice or procedure in this state".

Section 6 (4) makes it discretionary on the commissioner's part whether or not to hold a hearing on any change in referenced NAIC work product that materially changes the way in which market actions are conducted. Again, the "may" should read "shall". If interested parties disagree with a change made in NAIC work product, they ought to be able to have a hearing on this before the department to discuss their concerns. And if no such hearing is requested, the commissioner should be mandated to use the most recent changes to NAIC work product. We recommend that the language "or the commissioner may use the versions of the work products most recently developed and adopted by the NAIC" be deleted and replaced with the following sentence: "If no hearing is held, the Commissioner shall use the version of such work product most recently developed and adopted by the NAIC".

We appreciate your consideration of these continued PCI comments and look forward to our discussion of them on March 29. In the meantime, feel free to contact either Kenton Brine or Don Cleasby should you have any questions or need further information.

Don Cleasby
Vice President, Regional Manager and Counsel
Direct Phone: 847-553-3671
donald.cleasby@pciaa.net

Property Casualty Insurers Association of America

-----Disclaimer-----

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